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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 97-5243

ANTONIO ROJAS-ORTEGA

Petitioner-Appellant,

versus

Respondent-Appellee.

UNITED STATES OF AMERICA

Appeal from the United States District Court for the Southern District of Florida

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ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/Joseph W. Hatchett

CHIEF JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case Number : 96-10111-CIV-JLK

UNITED STATES OF AMERICA,

Appellee,

vs.

ANTONIO ROJAS-ORTEGA

Appellant.

_____/

APPELLANT ANTONIO ROJAS-ORTEGA'S REQUEST FOR ISSUANCE OF CERTIFICATE OF APPEAL ABILITY

COMES NOW, the Appellant, ANTONIO ROJAS-ORTEGA, by and through his undersigned counsel, and pursuant to Rule 22(b) of the Federal Rule of Appellate Procedure. The grounds for Appellant's request is as follows:

1. The Appellant filed a Motion to Vacate Sentence, pursuant to Title 28 U.S.C. § 2255 on October 2, 1996. In addition, the government filed a Motion Pursuant to Rule 35 of the Federal Rules of Criminal Procedure on October 20, 1992.

2. That both the petitioner's Writ of Habeas under § 2255 and the Government's Rule 35 Motion were consolidated.

3. That on June 25th an order was entered Granting defendant's Motion For Reconsideration and Reaffirming Magistrate's Report & Recommendation dated June 25, 1996. 4. That on May 18, 1998 the Honorable James Lawrence King issued an Order denying a Certificate of Appealability, as to both the Appellant's Motion under § 2255 and the Government's Rule 35 Motion.

5. The Basis of Jurisdiction before this court is found at 28 U.S.C. § 1292. In addition, under 28 U.S.C. § 2253 (c), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), an appellant seeking to appeal a denial of a habeas, must seek a certificate of appeal ability under Title 28 U.S.C. § 2253 (c).

6. A certificate of appealability shall be issued when an Applicant demonstrates that he has made a "substantial showing of the denial of a constitutional right". See Title 28 U.S.C. § 2253 (c)(2) see also Hardwick v. Singletary , 126 F. 3d 1312 (11th Cir. 1997).

7. In the case before this court, the applicant seeks to appeal the Court's order as to the Government's Rule 35 motion. Although the government did in fact file and move to have the applicant's sentence reduced, i.e. by 60 months, this was done without the benefit of a hearing. The court's actions in having ruled upon the government's motion for a reduction of sentence without the benefit of a hearing deprived the Applicant of due process of law under the 5th Amendment of the United States Constitution. The Applicant has a due right to be sentenced on accurate information.

8. In addition, the court deprived the Applicant of his due process right to an evidentiary hearing regarding his Motion to Vacate Sentence and be re-sentenced based on United States v. Bailey, 116 S.Ct. 501 (1995).

WHEREFORE, the Applicant respectfully requests that this court issued a certificate of appeal ability on this matter.

I HEREBY CERTIFY that a copy of the foregoing was furnished by mail, to Neal Stephens, Assistant US Attorney, 99 NE 4th Street, Miami, FL 33132 and to the office of the US Attorney, Appellate Division, 99 NE 4th Street, Miami, FL 33132 on this 17 day of June, 1998.

Respectfully, submitted,

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BY: _____
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 96-10111-CIV-KING
96-10011-CR-KING

UNITED STATES OF AMERICA

Plaintiff,

vs.

ANTONIO ROJAS-ORTEGA,

Defendant.

_____/

ORDER DENYING CERTIFICATE OF APPEALABILITY

THIS CAUSE comes before the Court upon Defendant's Notice of Appeal, filed July 9, 1997.

The Court thoroughly reviewed the record, both in affirming the Magistrate Judge's Report and Recommendation and in light of the instant Notice of Appeal, and concludes that an appeal in this matter would be frivolous. The Court therefore declines to issue a certificate of appealability pursuant to 28 U.S.C. § 2253.

Accordingly, after careful review of the record, and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that no certificate of appealability shall issue in the above-styled case.

DONE and ORDERED in chambers at the James Lawrence King Federal Building and United States District Courthouse, Miami, Florida, this 18th day of May, 1998.

JAMES LAWRENCE KING
U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: Ana M. Jhones, Esq.
Neal J. Stevens, AUSA
Miguel J. Cortez, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 96-10111-CIV-KING
91-10011-CR-KING

ANTONIO ROJAS-ORTEGA

Movant,

v.

UNITED STATES OF AMERICA

Respondent.

_____/

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on the movant's Motion to Vacate, Set Aside, or Correct Sentence filed pursuant to 28 U.S.C. § 2255, which was referred to United States Magistrate Judge, Lurana S. Snow, for report and recommendation.

I. PROCEDURAL HISTORY

The movant was charged by indictment with conspiracy to import cocaine, importation of cocaine, conspiracy to possess with intent to distribute cocaine, possession of cocaine with intent to distribute, and using and carrying a firearm during and in relation to a drug trafficking crime, in violation of 21 U.S.C. §§ 963, 952 (a), 846 and 841 (a) (1) and 18 U.S.C. § 924 (c).

On August 21, 1991, the movant pleaded guilty to all counts of the indictment. On October 21, 1991, this court imposed concurrent prison terms of 262 months on each of

Counts I-IV, and a consecutive term of sixty months on Count V. In addition, the court imposed a total supervised release term of eight years and a special assessment in the amount of $250. The movant did not appeal.

On October 20, 1992, the Government filed a timely motion pursuant to Fed. R. Crim. P. 35 to reduce the movant's sentence by sixty months. In the instant motion to vacate, set aside or correct sentence, pursuant to 28 U.S.C. § 2255, the movant requests the same relief, based on his contention that his conviction on the § 924 (c) count should be vacated.

II. RECOMMENDATIONS OF LAW

The movant relies on the recent Supreme Court decision of Bailey v. United States, _____, 116 S. Ct. 501 (1995), which held that to prove "use" of a firearm for purposes of 18 U.S.C. § 924 (c), the Government must demonstrate that the firearm was actively employed by the accused. The movant contends that the evidence presented by the Government is insufficient to show that he actively employed the firearm during the commission of the predicate offense.

The movant waived his right to assert this factual defense by virtue of his plea of guilty. In United States v. Broce, 488 U.S. 563, 569, the Supreme Court Held:

> A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilty and a lawful sentence. Accordingly, when the judgment of conviction on a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary.

Similarly, in Brady v. United States, 397 U.S. 742 (1970), the Court explained:

> A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.

Id. at 757 (citation omitted) (emphasis added). See also, United States v. Taffe, 36 F.3d 1047, 1049 (11th Cir. 1994); United States v. Kelsey, 15F.3d 152, 153 (10th Cir. 1994).

The movant does not contend that his plea was not voluntarily made in light of the applicable law at the time. Therefore, he cannot now attack his conviction on the basis of a later decision which arguably weakened the Government's case against him. Accordingly, the movant is not entitled to relief based on the decision in Bailey, supra.

In addition, the gun in question was recovered from the back seat of the movant's truck. This is sufficient to support a conviction for "carrying" a firearm under § 924 (c). United States v. Range, 94 F. 3d 614, 617 (11th Cir. 1996); United States v. Farris, 77 F. 3d 391, 395-396 (11th Cir. 1996). In Farris, the defendant was arrested as he approached a motel to conduct a drug transaction. His co-defendants were apprehended in the vehicle in which the defendant had arrived, and in which a gun was located in the glove department. Concluding that Farris had "carried" the firearm, the court held that "(t)he means of carrying is the vehicle itself, rather than the defendant's hands or pocket."

Id. at 395, citing United States v. Cardenas, 864 F. 2d 1528, 1535-36 (10th Cir. 1989).

Accordingly, the movant is not entitled to a reduction of his sentence pursuant to 28 U.S.C. § 2255. However, the Government has requested the same sentence reduction in its Rule 15 motion filed in 1992, and there appears to be no factual or legal basis to preclude the granting of that motion.

III. CONCLUSION

This Court has reviewed carefully the record in this matter as well as the applicable law, and being fully advised in the premises, it is hereby

RECOMMENDED that the Motion to Vacate, Set Aside, or Correct Sentence be DENIED. It is further

RECOMMENDED that the Government's Motion to Reduce Sentence (DE 183) be GRANTED, and that the movant's prison term be reduced by sixty months.

The parties will have ten days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with the Honorable James L. King, Senior United District Judge. Failure to file objections timely shall bar the parties from attacking on appeal factual findings contained herein. Nettles v. Wainwright, 677 F. 2d 404 (5th Cir. 1982) (en banc).

DONE AND SUBMITTED at Fort Lauderdale, Florida, this 28th day of April, 1997.

LORANA S. SNOW
CHIEF UNITED STATES MAGISTRATE JUDGE

Copies to:
Ana M. Jhones, Esq.
AUSA Neal J. Stephens (MIA)